

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95481
)	
ANGELO JOHNSON,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE THOMAS J. PREBIL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Angelo Johnson appeals his convictions after a jury trial in St. Louis County, Missouri. On July 11, 2014, Judge Thomas J. Prebil signed a final judgment and sentenced Mr. Johnson as a predatory sexual offender to life in prison for each of his convictions, with the sentences to run concurrently.

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, section 3, Mo. Const.; section 477.050. This Court thereafter granted Mr. Johnson's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

STATEMENT OF FACTS

Angelo Johnson was charged by an information with three counts of statutory rape in the first degree, Section 566.032 (Counts 1, 4, and 6); six counts of statutory sodomy in the first degree, Section 566.062 (Counts 2, 3, 8, 9, 10, and 11)¹; three counts of incest, Section 568.020 (Counts 5, 7, and 13); and statutory rape in the second degree, Section 566.034 (Count 12). (LF 21-23).

Mr. Johnson was additionally charged as a predatory sexual offender, alleging first that between June 14, 1998 and February 10, 2003, Mr. Johnson “committed the crime of statutory rape in the first degree and statutory sodomy in the first degree in that [Mr. Johnson] had sexual intercourse with D.P. who was less than twelve years old and [Mr. Johnson] subjected D.P. to sodomy by placing his penis in D.P.’s mouth, when she was less than fourteen years old.” (LF 23). This was the same conduct alleged in Counts 1 and 2 of the information and presented to the jury as instructions 8 and 9. (LF 70-71).

Next, the information charging Mr. Johnson as a predatory sexual offender alleged that in between February 11, 2002 and February 10, 2003, Mr. Johnson “committed the crime of statutory rape in the first degree and statutory sodomy in the first degree in that [Mr. Johnson] had sexual intercourse with R.J., who was less than twelve years old and [Mr. Johnson] subjected R.J., to sodomy by placing his penis in R.J.’s mouth, when she was less than twelve years old.” (LF 23-24). This was the same conduct alleged in counts 6 and 8 of the information and presented to the jury as instructions 13 and 15. (LF 75, 77).

¹ The jury acquitted Mr. Johnson of Count 10.

At the close of all evidence, the State requested that the trial court find Mr. Johnson to be a predatory sexual offender. (TR 596). The trial court found that of Section 558.018.5, subsections 1 and 2 did not apply to Mr. Johnson. (TR 598). The trial court considered subsection 3, but it stated that it did not see how it could “make this finding since there’s no prior criminal convictions on the part of the defendant.” (TR 598). The court further stated, “I don’t see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed.” (TR 598-599). Counsel for Mr. Johnson stated, “given the fact that we are in trial and there hasn’t been a decision here, we don’t know whether or not he has committed these acts. Because again he hasn’t been found guilty on anything as of yet.” (TR 600).

The trial court found that Mr. Johnson did not qualify as a predatory sexual offender, stating, “I think my judgment tells me that this statute does not apply to the facts of this situation.” (TR 603). The court further stated, “I think the statute is designed to contemplate conduct of a defendant of a prior time and not to consider the evidence of the charges for which the defendant is on trial . . .” (TR 603). Finally, the court stated, “[s]o I’m going to deny the State’s motion to have the defendant determined to be a predatory sexual offender under Section 558.018.” (TR 603).

At the sentencing hearing, the State once again argued that the court should find Mr. Johnson to be a predatory sexual offender. (TR 676). Counsel for Mr. Johnson stated, “we did talk about this issue earlier at the beginning of the trial. And the Court ruled on it at that particular time.” (TR 676-677). Counsel for Mr. Johnson also reiterated his

argument that the predatory sexual offender statute did not apply to Mr. Johnson, in that Mr. Johnson had no prior charges. (TR 676-677). The trial court stated that it had changed its mind, and that it now believed that Section 558.018.5(3) applied to Mr. Johnson. (TR 677). The court found that Mr. Johnson was a predatory sexual offender. (TR 678). Accordingly, the trial court sentenced Mr. Johnson to life in prison for counts 1, 2, 3, 6, 8, 9, and 11. (TR 681-685). Additionally, the court determined that Mr. Johnson would have to serve at least twenty-five years of those concurrent sentences before becoming eligible for parole. (TR 681).

This appeal follows.

POINTS RELIED ON

Point I.

The trial court erred or plainly erred in finding Mr. Johnson to be a predatory sexual offender under Section 558.018 at the sentencing hearing because this violated Section 558.021 and Mr. Johnson's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 10 of the Missouri Constitution, in that during the trial, the court found Mr. Johnson did *not* qualify as a predatory sexual offender; at the sentencing hearing, in violation of Section 558.021's requirement that the findings in a jury trial be made prior to submission to the jury, the court changed its mind, and it determined that Mr. Johnson *did* qualify as a predatory sexual offender. A manifest injustice resulted because under section 558.018.6, the trial court was required to sentence Mr. Johnson to life in prison for Counts 1, 2, 3, 6, 8, 9, and 11, instead of being allowed to consider the full range of punishment; a manifest injustice also resulted because the record is clear that the trial court was unwilling to make a finding that Mr. Johnson had committed these crimes before the case was submitted to the jury.

Alleyne v. United States, 133 S.Ct. 2151 (2013);

State v. Starnes, 318 S.W.3d 208 (Mo. App. W.D. 2010);

State v. Teer, 275 S.W.3d 258 (Mo. banc 2009);

State v. Wilson, 343 S.W.3d 747 (Mo. App. E.D. 2011);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Sections 558.011, 558.018, 558.019, 558.021, and 577.023; and
Rule 30.20.

Point II.

The trial court erred in finding Mr. Johnson to be a predatory sexual offender because Section 558.018.5(3) should not have been interpreted to apply to Mr. Johnson, who had not previously committed a sexual offense, in that such an interpretation would violate Mr. Johnson's right under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 10 and 18(a) of the Missouri Constitution to have each element of the crime proven to a jury beyond a reasonable doubt and would force the trial court to abandon neutrality and determine the defendant's guilt before the case is submitted to the jury; here, a finding that Mr. Johnson qualified as a predatory sexual offender constituted an element of the offenses because it increased the statutory minimums for each offense from ten years in prison to life in prison.

Alleyne v. United States, 133 S.Ct. 2151 (2013);

Apprendi v. New Jersey, 530 U.S. 466 (2000);

State v. Cowan, 247 S.W.3d 617 (Mo. App. W.D. 2008);

State v. Mack, 12 S.W.3d 349 (Mo. App. W.D. 2000);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, §§ 10 and 18(a); and

Sections 558.011, 558.018 and 558.021.

ARGUMENT

Point I.

The trial court erred or plainly erred in finding Mr. Johnson to be a predatory sexual offender under Section 558.018 at the sentencing hearing because this violated Section 558.021 and Mr. Johnson's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 10 of the Missouri Constitution, in that during the trial, the court found Mr. Johnson did *not* qualify as a predatory sexual offender; at the sentencing hearing, in violation of Section 558.021's requirement that the findings in a jury trial be made prior to submission to the jury, the court changed its mind, and it determined that Mr. Johnson *did* qualify as a predatory sexual offender. A manifest injustice resulted because under section 558.018.6, the trial court was required to sentence Mr. Johnson to life in prison for Counts 1, 2, 3, 6, 8, 9, and 11, instead of being allowed to consider the full range of punishment; a manifest injustice also resulted because the record is clear that the trial court was unwilling to make a finding that Mr. Johnson had committed these crimes before the case was submitted to the jury.

A. Preservation and Standard of Review

At the sentencing hearing, the State argued that the court should find Mr. Johnson to be a predatory sexual offender despite the fact that the court had found Mr. Johnson did not qualify as a predatory sexual offender before the case was submitted to the jury. (TR 676). In response, counsel for Mr. Johnson stated, "we did talk about this issue

earlier at the beginning of the trial. And the Court ruled on it at that particular time.” (TR 676-677). Counsel for Mr. Johnson also reiterated his argument that the predatory sexual offender statute did not apply to Mr. Johnson, in that Mr. Johnson had no prior charges. (TR 676-677).

Arguably this issue is preserved for review since counsel for Mr. Johnson mentioned the fact that the trial court had already made its ruling on whether or not Mr. Johnson qualified as a predatory sexual predator, and counsel further argued that Mr. Johnson did not qualify. Furthermore, it would have been impossible for Mr. Johnson to include this issue in his motion for new trial since the error did not occur until the sentencing hearing, well after his motion for new trial was due. *See State v. Cowan*, 247 S.W.3d 617, 618-19 (Mo. App. W.D. 2008). This Court applies an abuse of discretion standard when reviewing whether or not the trial court properly found a defendant to qualify for enhancement punishment provisions. *State v. Brink*, 218 S.W.3d 440, 447 (Mo. App. W.D. 2006). A trial court “abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration.” *Id.* (citation and internal quotation omitted).

However, counsel for Mr. Johnson did not cite Section 558.021 in arguing that it was improper to find Mr. Johnson to be a predatory sexual offender. If this Court finds this issue is therefore not preserved, Mr. Johnson respectfully requests plain error review under Rule 30.20. Claims of plain error under Rule 30.20 are reviewed “under a two-prong standard.” *State v. Cable*, 207 S.W.3d 653, 659 (Mo. App. S.D. 2006). First, this Court determines whether there is error that is evident, obvious, and clear. *Id.* If so, then

this Court looks to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has occurred as a result of the error. *Id.* at 659-60.

B. Analysis

Section 558.021.1 states that “[t]he court shall find the defendant to be a . . . predatory sexual offender if: . . . (3) The Court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a . . . predatory sexual offender.” Section 558.021.2 states that “[i]n a jury trial, the facts shall be pleaded, established and found *prior to submission to the jury outside of its hearing* . . .”

This Court determined in *State v. Teer* that “[t]he plain language of section 558.021.2 **imposes a mandate** requiring that prior offender status be pleaded and proven prior to the case being submitted to the jury.” 275 S.W.3d 258, 261 (Mo. banc 2009)(emphasis added). This Court also determined that section 558.021 “implicates a defendant’s liberty,” and that the statute must therefore “be construed strictly against the state and in favor of the defendant.” *Id.*, citing *Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999).

In the present case, the trial court did not make a finding that Mr. Johnson was a predatory sexual offender before the case was submitted to the jury. In fact, just the opposite occurred. At the close of all evidence, when asked by the State to make a finding as to whether or not Mr. Johnson qualified as a predatory sexual offender, the court stated, “I don’t see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed.” (TR 598-

599). The trial court found that Mr. Johnson did not qualify as a predatory sexual offender, stating, “I think my judgment tells me that this statute does not apply to the facts of this situation.” (TR 603). It was not until the sentencing hearing that the court found Mr. Johnson to be a predatory sexual offender. The Court stated at the hearing, “I’ve changed my mind about this. And I think that Section 558.018 Section 53² is applicable here.” (TR 677).

Making this finding at the sentencing hearing instead of prior to submission of the case to the jury violated the plain language of Section 558.021.2. Furthermore, previous cases have determined that the failure to follow the procedure outlined by section 558.021 constitutes plain error.

In *State v. Wilson*, “although the State introduced exhibits showing prior convictions before the case was submitted to the jury, the trial court made no finding as to whether Defendant was a chronic offender as required by Section 577.023.7(3) and Section 577.023.8.”³ 343 S.W.3d 747, 750 (Mo. App. E.D. 2011). The Eastern District determined that “the trial court’s actions . . . are deficient in that the court failed to make a finding of chronic offender status before submitting the case to the jury.” *Id.* The Court found that this constituted plain error, and it remanded the case for resentencing without

² It is clear that the trial court was referring to Section 558.018.5(3).

³ Like Section 558.021.2, Section 577.023.8 states that “the facts [showing chronic offender status] shall be pleaded, established and found prior to submission to the jury outside of its hearing.”

the option of sentencing the defendant “as any type of prior offender for the DWI offense.” *Id.* at 751.

In *State v. Starnes*, though the State proved prior to submission of the case to the jury that the defendant was an aggravated offender, it failed to prove that the defendant was a chronic offender. 318 S.W.3d 208, 211 (Mo. App. W.D. 2010). Specifically, the State failed to prove that the defendant had been represented by counsel or waived counsel for a fourth previous conviction for driving while intoxicated. *Id.* At a hearing held after the trial but before sentencing, additional evidence was presented regarding this past conviction, and the trial court determined that the defendant *was* represented by counsel, and that he qualified as a chronic offender. *Id.* at 211-12. On appeal, the State argued that despite the timing errors made by the trial court, these errors did not constitute plain error on appeal. *Id.* at 215. The Western District of this Court disagreed, stating that “[w]here it appears that a defendant has been improperly sentenced as a prior or persistent offender, plain error review is appropriate.” *Id.* at 216, quoting *State v. Manley*, 223 S.W.3d 887, 892 (Mo. App. W.D. 2007). The Court further found that manifest injustice resulted since the defendant “was sentenced to a punishment greater than the maximum allowed sentence” that could be given to an aggravated offender. *Id.*

In *State v. Collins*, the State agreed that it did not produce sufficient evidence to show that the defendant qualified as a chronic offender under Section 577.023. 328 S.W.3d 705, 708 (Mo. banc 2011). Specifically, the State failed to present the required evidence that the defendant “was represented by or waived the right to an attorney for his prior intoxication-related traffic offenses.” *Id.* The defendant did not object to the finding

that he was a chronic offender, so this Court reviewed his claim for plain error. *Id.* This Court found that sentencing the defendant as a chronic offender despite the State's failure to adduce the necessary evidence prior to sentencing constituted plain error. *Id.* at 710. Although *Collins* did not involve the timing requirement of section 558.021, it is nonetheless relevant here because this Court explicitly discussed cases interpreting the timing requirement of section 558.021 in determining that the State should not have the opportunity to present additional evidence at the new sentencing hearing. *Id.* at 708-10.

In the proceedings below, both the Eastern District and the State agreed that the trial court failed to abide by the timing requirements of section 558.021. (Slip Opinion, *10). The Court determined, though, that there was no plain error due to the fact that Mr. Johnson was not subject to a higher sentence than would have been possible without a finding that he was a predatory sexual offender. (Slip Opinion, *11).

While it is true that a life sentence would have been possible even without a predatory sexual offender finding, the Eastern District Court disregarded the fact that the minimum sentence available increased from ten years to life in prison. However, there is no basis to distinguish between increased maximum sentences and increased minimum sentences, especially when there is such a substantial increase in the mandatory minimum sentence.

The possible distinction between increased maximum sentences and increased minimum sentences was discussed by the United State Supreme Court in *Alleyne v. United States*, 133 S.Ct. 2151, 2158 (2013). In that case, the Court found that there was no distinction between the two, and it extended the protections provided by *Apprendi v.*

New Jersey, 530 U.S. 466 (2000) to situations where mandatory minimum sentences but not mandatory maximum sentences were increased. *Id.* at 2163. The Court stated that facts that increase both maximums and minimums “alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.” The Court went on to state that “there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.” *Id.* at 2163.

Next, Missouri Courts have also granted plain error relief in situations where the trial court mistakenly believes prior and persistent offenders are subject to increased minimum sentences as well as increased maximum sentence. *See State v. Troya*, 407 S.W.3d 695, 700-01 (Mo. App. W.D. 2013); *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. W.D. 2008).

In *Troya*, the defendant was convicted of a class B felony, and he was properly found to be a persistent offender. 407 S.W.3d at 700-01. The trial court sentenced the defendant to ten years in prison. *Id.* at 699. This was within the proper range of punishment, which should have been from five years in prison (the minimum for a class B felony) to thirty years or life in prison (the maximum for a class A felony). *Id.* at 701. The Western District Court of Appeals determined, though, that the trial court had mistakenly believed that the defendant faced a minimum sentence of ten years in prison (the minimum for a class A felony). *Id.* In finding that this mistake constituted plain error, the Western District stated “[a] sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the

question of punishment in the light of the true facts, regardless of the eventual outcome.” 407 S.W.3d 695, 700 (Mo. App. W.D. 2013)(internal quotations and citations omitted). The Court further stated, “[t]his is so even if it is likely the court will return the same sentence.” *Id.* (citation omitted). Under the logic of Eastern District’s slip opinion in the present case, there should have been no plain error in *Troya* since the defendant did not face an increase in the maximum sentence available. The opinion in the present case therefore conflicts with the Western District’s opinion in *Troya*.

As stated by the United States Supreme Court in *Alleyne*, “there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.” 133 S.Ct. at 2163. This is because both maximums and minimums “alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.” *Id.* at 2158. Under Section 558.011.1(1), the trial court ordinarily would have had the option to sentence Mr. Johnson to just ten years in prison (the minimum sentence for a class A felony). After finding that Mr. Johnson was a predatory sexual offender, though, the trial court had no choice but to sentence Mr. Johnson to life in prison. *See* Section 558.018.6. Such a dramatic increase in the mandatory minimum sentence surely constitutes a manifest injustice.

This error also constitutes manifest injustice due to the fact that the record is clear that the trial court was not willing to make a finding that Mr. Johnson had committed these crimes before the case was submitted to the jury. The court stated, for instance, “I don’t see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed.” (TR 598-599).

Section 558.021.2 is clear that the court must make its finding before the case is submitted to the jury. Because it is clear that the trial court was reasonably unwilling to make this finding before the jury returned a verdict, the trial court's later determination that Mr. Johnson was a predatory sexual offender constitutes manifest injustice.

Finally, the Eastern District noted in its opinion that the trial court had given Mr. Johnson the chance to receive parole for his life sentence after serving twenty-five years in prison. (Slip Opinion, *11). The Court stated that "had Defendant been sentenced to life absent sentence enhancement, he would have been required to serve 25 and one-half years' imprisonment before becoming eligible for parole." (Slip Opinion, *11), citing section 558.019.3 (requiring a defendant convicted of a dangerous felony to serve at least 85 percent of his prison term).

The Eastern District overlooked the fact that Mr. Johnson was born on September 2, 1962. (LF 21). Therefore, when the complaint was filed in this case on December 30, 2011, Mr. Johnson was forty-nine years old. (LF 2). The docket sheets do not indicate that Mr. Johnson was ever let out on bond while he was awaiting trial, so by the time he reaches the age of seventy, he will have served twenty-one years in prison. Had Mr. Johnson been sentenced to life in prison without being classified as a predatory sexual offender, he would be eligible for parole as soon as he turned seventy under section 558.019.3 (stating that prisoners who have committed dangerous felonies are eligible for release when they attain seventy years of age if they have served forty percent of the sentences imposed). However, because Mr. Johnson was found to be a predatory sexual offender, the trial court determined that Mr. Johnson must serve at least twenty-five years

of his sentence before becoming eligible for parole. Therefore, as currently sentenced, Mr. Johnson will be seventy-four years old before becoming eligible for parole.⁴ These four years could be the difference between Mr. Johnson dying in prison and spending the final years of his life in the outside world.

Mr. Johnson respectfully asks this Court to remand his case for resentencing without the possibility of sentencing Mr. Johnson as a predatory sexual offender.

⁴ Both section 558.018.7 and 558.019.3 contain clauses indicating they control over other provisions. Section 558.018.7 would control here, though, because it is the more specific statute. *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996). Also, section 558.018.6 states that “subsection 4 of section 558.019 shall not apply to persons found to be predatory sexual offenders for the purposes of determining the minimum prison term or the length of sentence as defined or used in such subsection.” Section 558.019.4 states that “[a] sentence of life shall be calculated to be thirty years.” Since a life sentence for a predatory sexual offender would be calculated as life instead of thirty years, the benefits provided under section 558.019.3 do not apply to those sentenced as predatory sexual offenders.

Point II.

The trial court erred in finding Mr. Johnson to be a predatory sexual offender because Section 558.018.5(3) should not have been interpreted to apply to Mr. Johnson, who had not previously committed a sexual offense, in that such an interpretation would violate Mr. Johnson's right under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 10 and 18(a) of the Missouri Constitution to have each element of the crime proven to a jury beyond a reasonable doubt and would force the trial court to abandon neutrality and determine the defendant's guilt before the case is submitted to the jury; here, a finding that Mr. Johnson qualified as a predatory sexual offender constituted an element of the offenses because it increased the statutory minimums for each offense from ten years in prison to life in prison.

A. Preservation and Standard of Review

At the close of all evidence, in responding to the State's argument that Mr. Johnson qualified as a predatory sexual offender, the court stated, "I don't see how I can make this finding prior to a determination by the jury if one is made that he has committed these acts that he is alleged to have committed." (TR 598-599). Counsel for Mr. Johnson stated, "given the fact that we are in trial and there hasn't been a decision here, we don't know whether or not he has committed these acts. Because again he hasn't been found guilty on anything as of yet." (TR 600). The trial court found that Mr. Johnson did not qualify as a predatory sexual offender, stating, "I think my judgment tells

me that this statute does not apply to the facts of this situation.” (TR 603). The court further stated, “I think the statute is designed to contemplate conduct of a defendant of a prior time and not to consider the evidence of the charges for which the defendant is on trial . . .” (TR 603).

At the sentencing hearing, the State once again argued that the court should find Mr. Johnson to be a predatory sexual offender. (TR 676). Counsel for Mr. Johnson stated, “we did talk about this issue earlier at the beginning of the trial. And the Court ruled on it at that particular time.” (TR 676-677). Counsel for Mr. Johnson also reiterated his argument that the predatory sexual offender statute did not apply to Mr. Johnson, in that Mr. Johnson had no prior charges. (TR 676-677). The trial court stated that it had changed its mind, and that it now believed that Section 558.018.5(3) applied to Mr. Johnson. (TR 677). The court found that Mr. Johnson was a predatory sexual offender. (TR 678).

Because counsel argued Mr. Johnson did not qualify as a predatory sexual offender below, this issue is preserved for review. Rule 29.11(e). Furthermore, as stated in the first point relied on, it would have been impossible for Mr. Johnson to include this issue in his motion for new trial since the error did not occur until the sentencing hearing, well after his motion for new trial was due. *See State v. Cowan*, 247 S.W.3d 617, 618-19 (Mo. App. W.D. 2008). “Statutory interpretation is a question of law, and questions of law are reviewed de novo.” *State v. Downing*, 359 S.W.3d 69, 70 (Mo. App. W.D. 2011), quoting *State v. Pesce*, 325 S.W.3d 565, 575 (Mo. App. W.D. 2010). As such, “the lower

court's ruling on a question of law is not a matter of judicial discretion.” *State v. Laplante*, 148 S.W.3d 347, 348 (Mo. App. S.D. 2004).

B. Analysis

The Court found that Mr. Johnson was a predatory sexual offender under Section 558.018.5(3). (TR 677). The section states that a person is a “predatory sexual offender” if he “[h]as committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 of this section, whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts.”

The information charging Mr. Johnson as a predatory sexual offender alleged first that between June 14, 1998 and February 10, 2003, Mr. Johnson “committed the crime of statutory rape in the first degree and statutory sodomy in the first degree in that [Mr. Johnson] had sexual intercourse with D.P. who was less than twelve years old and [Mr. Johnson] subjected D.P. to sodomy by placing his penis in D.P.’s mouth, when she was less than fourteen years old.” (LF 23). This was the same conduct alleged in Counts 1 and 2 of the information and presented to the jury as instructions 8 and 9. (LF 70-71).

Next, the information charging Mr. Johnson as a predatory sexual offender alleged that in between February 11, 2002 and February 10, 2003, Mr. Johnson “committed the crime of statutory rape in the first degree and statutory sodomy in the first degree in that [Mr. Johnson] had sexual intercourse with R.J., who was less than twelve years old and [Mr. Johnson] subjected R.J., to sodomy by placing his penis in R.J.’s mouth, when she was less than twelve years old.” (LF 23-24). This was the same conduct alleged in counts

6 and 8 of the information and presented to the jury as instructions 13 and 15. (LF 75, 77).

The Eastern District stated in its slip opinion that no previous Court has interpreted the language of section 558.018.5(3). (Slip Opinion, *6). Therefore, the issue of first impression for this Court is whether that section allows for the same acts for which a defendant is being tried to be used to also classify the defendant as a predatory sexual offender. The use of the word “has” indicates that the events had to have occurred in the past. Under this interpretation, the crimes charged against Mr. Johnson in the present case should *not* have been used to classify him as a predatory sexual offender.

The State might argue that no language within the statute specifically excludes the charged conduct of the present case, and that it therefore could serve as the basis for the predatory sexual offender classification. However, no language specifically *includes* the charged conduct either. This should lead to a conclusion that the charged conduct in a case *cannot* be used to classify someone as a predatory sexual offender since “[w]here the meaning of the statute is unclear or ambiguous, [this Court] will construe it strictly against the State . . .” *State v. Mack*, 12 S.W.3d 349, 351 (Mo. App. W.D. 2000).

An interpretation allowing for charged conduct to serve as the basis of the finding would also be problematic in that such an interpretation would violate Mr. Johnson’s right under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 10 and 18(a) of the Missouri Constitution to have each element of the crime proven to a jury beyond a reasonable doubt.

As stated in Mr. Johnson's first point relied on, Section 558.021 requires the trial court to make findings as to whether a defendant qualifies as a predatory sexual offender before the case is submitted to the jury. Furthermore, Section 558.018.6 increases the minimum punishment for a class A felony established as ten years by Section 558.011 to life in prison.

However, the United States Supreme Court determined in *Alleyne v. United States* that "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." 133 S.Ct. 2151, 2158 (2013).⁵ The Court determined that this was true because the Sixth Amendment to the United States Constitution and the Due Process Clause require "that each element of a crime be proved to the jury beyond a reasonable doubt." *Id.* at 2156. An interpretation of Section 558.018.5(3) that would allow for the trial court to find in a jury trial that the defendant actually committed the crimes with which he has been charged before the case is submitted to the jury would violate this principle.

"As a principle of statutory construction, this court should reject an interpretation of a statute that would render it unconstitutional, when the statute is open to another plausible interpretation by which it would be valid." *State ex rel. Neville v. Grate*, 443

⁵ *Alleyne* extended the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), where the United States Supreme Court determined that "any fact that increased the statutory maximum sentence must be an 'element' of the offense to be found by the jury."

S.W.3d 688, 693 (Mo. App. W.D. 2014), citing *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 278 (Mo. App. W.D. 2010).

As stated previously, this Court should adopt the “plausible interpretation” of Section 558.018.5(3) that it refers only to past conduct that is different than the conduct for which a defendant is being tried. Any other interpretation would force the trial court to find facts which increase the mandatory minimum punishment in violation of *Alleyne*, 133 S.Ct. at 2158. Any other interpretation would also inappropriately force the trial court to abandon neutrality and determine the defendant’s guilt before the case has even been submitted to the jury. *See State v. Taylor*, 929 S.W.2d 209, 220 (Mo. banc 1996)(“The United States and Missouri Constitutions guarantee a criminal defendant an impartial tribunal.”).

Because the information alleging that Mr. Johnson was a predatory sexual offender relied on the same conduct with which Mr. Johnson was charged, the trial court erred in finding Mr. Johnson to be a predatory sexual offender. Mr. Johnson respectfully asks this Court to remand his case for resentencing without the possibility of sentencing Mr. Johnson as a predatory sexual offender.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully asks this Court to remand his case for resentencing without the possibility of sentencing Mr. Johnson as a predatory sexual offender.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel E. Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,119 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 18th day of March, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Karen Kramer, Assistant Attorney General, at Karen.Kramer@ago.mo.gov.

/s/ Samuel Buffaloe

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